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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~415~~ 19

MITSUGI NISHIKAWA,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

I.

Comments Upon Respondent's Introductory Argument (Resp. Br. 14-21.)

Contrary to respondent's suggestion (Resp. Br. 15), it is *not* common ground between the parties that (Resp. Br. 16) "it is immaterial that the petitioner may not have known that his entering the Japanese army would result in his expatriation." If, as we believe the law to be (*Perkins v. Elg*, 307 U. S. 325, 334), that "expatriation is the voluntary *renunciation* or *abandonment* of nationality and allegiance," then, we submit, it becomes highly material as to whether petitioner knew his entry into the Japanese army would result in expatriation. From the

standpoint of the Government, if it could show that petitioner *knew* his Japanese military service would result in expatriation, we have no doubt it would strenuously argue that this showed an intention to renounce or abandon United States nationality; at least it would so argue on the issue of voluntary conduct. Conversely, we submit, it is likewise material, from the standpoint of petitioner's case that he did not know such service would result in expatriation.[1]

Savorgnan v. United States, 338 U. S. 491, cited by respondent (Resp. Br. 16) is not to the contrary. That was a case of *taking on* allegiance to a foreign country *and* actually *renouncing American citizenship* (see page 495, fn. 3),[2] thus coming within this court's definition of what expatriation is (*Perkins v. Elg, supra*). It is true that Mrs. Savorgnan claimed (338 U. S. at 499) she did not intend to give up American citizenship (although she conceded (*ibid.*) that she intended to and did volun-

[1]There is no contention by respondent that petitioner knew he would lose his American citizenship by reason of his Japanese army service. Indeed the trial court conceded [R. 57] that petitioner did not so know. In this connection, it should be pointed out that the subsection in question did not even go into effect until January 12, 1941 (8 U.S.C. [1946 Ed.] 906) which was long after petitioner became subject to and was actually aware that he was subject to the Japanese military conscription law. It should also be pointed out that the law itself was not passed until October 14, 1940 (54 Stat. 1168), likewise after plaintiff became, and was aware that he was subject to Japanese military service. Prior to January 12, 1941, there was no law expatriating a person who served in a foreign army.

[2]The instrument Mrs. Savorgnan signed said: "I, born an American citizen, declare I renounce and in truth do renounce my American citizenship

tarily apply for and accept Italian citizenship, but it is also true that this court's decision, fairly read, points to the contrary. Thus this court pointed out (338 U. S. at 502) that "she knew that the instruments related to her citizenship."[3] And this court further pointed out (*ibid.*) that Mrs. Savorgnan's husband understood Italian, and that "he was with her and able to translate and explain them (the documents she signed) to her when she signed them." Therefore, said this court (*ibid.*), she "was as responsible for understanding them as if they had been in English."

Accordingly, we do not think that this court was unfair to Mrs. Savorgnan when later, in *Moser v. United States*, 341 U. S. 41, 47, it distinguished, and properly so, the *Savorgnan* case and characterized Mrs. Savorgnan's actions and claim as simply "signing one thing and claiming another." (*Cf. McGrath v. Abo*, 186 F. 2d 706 (C. A. 9, 1951), cert. den. 342 U. S. 832.) To the extent that the dictum in *Savorgnan* stands for the proposition that intent is irrelevant in expatriation cases, considerable doubt has been cast thereon[4] by this court's decision in *Moser* as well as its decision in *Kawakita v. United States*, 343 U. S. 717, 727, where this court held that it was for the jury to determine whether petitioner there intended, by the various acts he performed, to

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[3] No such claim has or could be made in the case at bar.

[4] See "'Voluntary' A Concept in Expatriation Law," 51 Colum. L. Rev. 932, 944.

renounce his American citizenship. If, as contended by respondent here, intent is immaterial, the trial court in *Kawakita* in submitting the question to the jury, would clearly have been in error just as *Kawakita* claimed.

Respondent is likewise in error in his suggestion (Resp. Br., 18) that "there is universal agreement among the courts" that after the citizen establishes that he was born in the United States, the Government's burden in an expatriation case of going forward with the evidence is satisfied by showing the physical expatriating act itself, here, service in a foreign army. See, for example, *Brumi v. Dulles*, 235 F. 2d 855, where the Court of Appeals for the District of Columbia said (235 F. 2d at 856):

> ". . . . (W)hen an American citizen is said to have expatriated himself, by joining the armed services of Italy, for example . . . the *voluntary character of such acts must be proved* under the strict standards above referred to, ..." (Italics added) (the standards referred to are those set forth by this court in *Gonzales v. Landon*, 350 U. S. 920; *Schneiderman v. United States*, 320 U. S. 118, 125).

And compare *Lehmann v. Acheson*, 206 F. 2d 592, 598 (C. A. 3, 1953):

> "It was the District Court's view that Lehmann bore the burden of establishing that his service in the Swiss Army and his taking of an oath of allegiance to Switzerland were involuntary. In that respect the District Court erred."

II.

The Burden of Proving Expatriation, Including the Element of Voluntary Conduct, Is on the Government and the Government Has Failed to Sustain That Burden. (Reply to Respondent's Point I; Resp. Br. 20-50.)

A.

The Voluntary Nature of Petitioner's Military Service Is Part of the Government's Case Which It Must Prove; It Cannot Rely Upon a Presumption of Voluntary Conduct. (Reply to Respondent's Point I, A; Resp. Br. 21-24.)

We have pointed out above how clearly *Brumi v. Dulles*, 235 F. 2d 855, required the Government to prove the voluntary character of the act. Respondent's effort (Resp. Br. 22) to interpret *Lehmann v. Acheson*, 206 F. 2d 592, as standing for the proposition that the fact of service is presumptively voluntary on the theory of "implicit acknowledgment" that the citizen has the burden of showing du. ss is misplaced in the light of the court's direct statement (*supra*, p. 4) that the District Court erred in its view that the plaintiff had the burden of showing involuntariness.

In an expatriation case this is as it should be by reason of the fact that, by its very definition, expatria ion is voluntary conduct. In other words, voluntary action is one of the indispensable elements of expatriation, and there is no more reason for relieving the Government, whose burden it is, admittedly, to prove expatriation, of that element of its case, than it is to relieve it of the

burden of proving any other element. Respondent's analogy to the defense of insanity in a criminal case is not apposite because sanity or insanity is not an element of the crime. If criminal cases are to be looked at for analogy, more analogous would be the elements of intent or willfulness in those crimes which require same before a crime can be said to have been committed. Thus this court, in *Bollenbach v. United States*, 326 U. S. 607, held that the possession of stolen property in a state other than in which it was stolen, shortly after the theft, raises no presumption that the possessor was the thief and transported stolen property in interstate commerce. Again, in *Morisette v. United States*, 342 U. S. 246, this court held that the requisite criminal intent to steal or knowingly convert government property cannot be presumed merely because the defendant took it. This case is of added value because the statute in question (18 U. S. C. 641) did not contain within its words the requirement of intent. Nevertheless this court held that the mere omission from the statute of any mention of intent did not eliminate that element from the crimes denounced, and therefore must be proved.[5] Another example is *Holland v. United States*, 348 U. S. 121, in which, although finding that the element of wilfulness was adequately proved, this court approved the rule that in a prosecution for income tax evasion, the taxpayer's wilfulness is an element necessary for conviction and that such wilfulness involves a

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[5]In its brief (Pgs. 35, 36) the Government has pointed out that Congress refrained from inserting the word "voluntary" in the proposed subsections (b) through (g) of Section 401 of the 1940 Act. But the Government concedes (Resp. Br. 16, 36) that subsection (c) was intended to apply only if the conduct was voluntary. The analogy to the *Morisette* case is manifest.

specific intent which must be proved by independent evidence and which cannot be inferred from the mere understatement of income. See also, *Quinn v. United States*, 349 U. S. 155, 165, as to the necessity of proving intent in a prosecution for contempt.

Other examples could be suggested. The point is that voluntary conduct is an element of the act of expatriation without which such conduct there simply is no expatriation. It is not merely that involuntary conduct is a defense to expatriation.

Respondent is in error, we respectfully suggest, in his assertion (Resp. Br. p. 10, fn. 10), that *Gonzales v. Landon*, 350 U. S. 920 did not hold contrary to his position. Quite the converse is true. The Court of Appeals for the District of Columbia in *Brunt v. Dulles*, 235 F. 2d 855 correctly interpreted *Gonzales* in holding that the Government must prove the element of voluntary conduct by the same standards of proof as any other element of expatriation. As we pointed out in our Opening Brief (p. 15), the major thrust of petitioner Gonzales' argument to this court was not, as respondent suggests (Resp. Br. p. 24, fn. 10), that he did not remain outside the country in order to avoid military service, but rather that he did not do so voluntarily and that the Government's proof to show voluntary conduct did not rise to the standard required. The decision in the *Gonzales* case, we submit, sustained petitioner's contention.

B.

Military Service by Reason of Conscription Raises a Rebuttable Presumption of Involuntariness. (Reply to Respondent's Point I, B; Resp. Br. 25-33.)

Respondent is correct when he states (Resp. Br. 25) that petitioner, as a part of his case, did show that his military service was under compulsion of law, the compulsory Japanese Military Conscription Law. [R. 18, 22-23.] In a sense, therefore, respondent's discussion under his Point I, A is academic because inextricably bound up with plaintiff's evidence that he served in the Japanese army was the evidence that this service was not volunteered, but was under and pursuant to the compulsory law of that country which provided for criminal punishment for violation thereof.

The courts below in this case are alone in agreeing with respondent (Resp. Br. 25) that compulsory military service due to conscription does not create a rebuttable presumption of involuntary conduct.[6]

Petitioner does not quarrel with respondent's generalization (Resp. Br. 25, 26) that all the surrounding circumstances may be overlooked to in determining whether a call to arms was answered voluntarily or involuntarily. But this does not meet the point at issue, which is that once it is established that military service was due to conscription under a law which calls for punishment for violation thereof, a rebuttable presumption arises of involuntary conduct. If there are surrounding circum-

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[6]See Pet. Op. Br. p. 17, f. n. 15 for an explanation that the Circuit Court for the District of Columbia which decided *Mlota v. Dulles*, 221 F. 2d 52 and *Acheson v. Marenza*, 202 F. 2d 453, agrees with petitioner and not respondent.

stances, they may go to rebut the presumption, they do not take away the presumption itself. (See Pet. Op. Br. 16-20.)

In suggesting (Resp. Br. 27) that military service by reason of conscription "should be of neutral import," respondent is denying a very fundamental fact of life itself.[7]

We have previously suggested (Op. Br. p. 17, fn. 15) that the Court of Appeal for the District of Columbia, as a result of further consideration in later cases, no longer adheres to the language quoted by respondent (Resp. Br. 29) from *Acheson v. Maenza*, 202 F. 2d 453, 457-458.[8]

The quotation by respondent (Resp. Br. 27) from the trial court decision in *Hamamoto v. Dulles*, 98 Fed. Supp. 904, 905, adds nothing to respondent's arsenal, it being by the same judge which decided the instant case. The quotation does serve the purpose, however, of making clear, if indeed there were any doubt, the legal error into which the trial court fell in the instant case in refusing to recognize that conscription creates a rebuttable presumption of involuntary conduct. Aside from the inapositeness of comparing conscription in the United States with conscription in totalitarian Japan, the quotation shows that it was the trial court's view not only that no pre-

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[7] *cf. e. g.* The recent newspaper stories of Ted Williams' reaction at being called back into the service although he was a member of the Reserves and might well have anticipated such a call.

[8] Although on the merits the *Maenza* decision is contrary to the decision below and we have no doubt that petitioner's case here would have been reversed by the court which heard the *Maenza* case. (*cf. Saccodato v. Dulles*, 226 F. 2d 243; *Aleta v. Dulles*, 221 F. 2d 52.)

sumption of involuntary conduct is created by conscription, but that, *affirmatively*, response to a compulsory military service call is in and of itself voluntary.[9] *At the very least*, the quotation demonstrates that the trial court gave *no consideration* to the fact of conscription (*cf. Augello v. Dulles*, 220 F. 2d 344, 347), thus clearly not considering all the surrounding circumstances.[10]

It is to be noted that the *Hamamoto* doctrine was adopted and followed by the trial court in *Bruni v. Dulles*, 121 Fed. Supp. 601, but was rejected on appeal. (*Bruni v. Dulles*, 235 F. 2d 855 (C. A. D. C., 1956).)

Aside from respondent's disagreement (Resp. Br. 27, fn. 12) with *Lehmann v. Acheson*, 206 F. 2d 592, it is apparent that he considers as *proof* of voluntary conduct, the fact that petitioner did not try to break and disobey the law.[11] We submit that such logic in a case seeking to strip one of his citizenship does not comport with the standards required.

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[9]We do not understand the court's use of the words "without resistance." What kind of "resistance" is possible save not obeying the law and going to jail? *Cf.* f. n. 24, p. 26, Pet. Op. Br. here.

[10]In answer to the second question posed in the quotation, we recognize that there may have been individual cases of conscripts in the United States going voluntarily and we are not saying that the same thing may not have been true in Japan. What we do say, in answer to the question, and we do not think we are being unpatriotic, rather are we just recognizing the facts of life, is that the chances are that the average conscript under our draft laws who complies does so involuntarily; that *if given the choice* (*cf.* Webster's definition of the word "voluntary") between going and not going, the vast majority of our conscriptees would not go. Particularly is this so in peacetime. Were the fact otherwise, there would be little, if any, need for our draft acts ever to have been enacted.

[11]This aside from the extra-legal effect such efforts would have had in Japan. *Cf.* recognition as to similar extra legal effect in Italy. *Acheson v. Maenza*, 202 F. 2d 453, 459.

On the record in this case, respondent's efforts (Resp. Br. 29-31) to distinguish away the Attorney General's *Panzica* opinion sound thin indeed. It is difficult to see how consideration of "the surrounding circumstances (here) show a genuine desire to serve and adhere to the foreign country, rather than mere submission to its laws." (From the Attorney General's *Panzica* opinion, Resp. Br. 31.) Rather do we suggest that more properly should it be said "that there is no indication of any such desire in Mr. (Nishikawa's) record." (*Ibid.*)

The *Lehmann* case is correct law. That court's wonderment at the Government's illogic is, of course, quite in order, especially in view of the Governments representation to this court in *Kazakita* (Br. in Opposition, No. 220, Misc. Oct. Term 1951, pp. 11-12) that "Petitioner was unequivocally excused for conduct required of him by the laws of Japan."

We note that respondent suggests (Resp. Br. 30) that a dual national in a foreign country could obtain aid from the Government of the United States in obtaining an exception to military service. This is simply not the fact. With all due respect, we respectfully suggest that respondent knows this. In this connection we point out that respondent in his brief has eschewed comment upon his own bulletin (State Department Publication No. 1316, par. 29, p. 17; quoted from at p. 28 of Pet. Op. Br.); or upon Orfield's article in 17 Geo. Wash. L. Rev. 427, 429, 431 (quoted from at p. 38 of Pet. Op. Br.) to the effect that no such representations are made, nor would they be effective if made. Respondent also has not distinguished or explained the Government's representation to this court in the *Kazakita* case (p. 11-12 of Br. in Opposition) that "the country of residence can force

such a national to serve in its armed forces." (See Pet. Op. Br. here, p. 37.)

Moreover, we believe respondent is turning on end the reasonable inferences to be drawn from the facts of this case as distinguished from one where the person has spent all his life in the country of his other nationality. (Resp. Br. 31-32.) It is true that the trial court [R. 55], as does respondent, felt that there is a difference where a person has all his ties in the foreign country and then serves by reason of conscription; that there he serves under duress. We suggest, on the contrary, that if the time of the citizen's going to the foreign country is of significance, just the opposite inference should be drawn. To do otherwise is to suggest that our American way of life, our American education, is a dismal failure, and that what we have inculcated in a lad over a period of many years, falls by the wayside during a few months residence in a foreign land. The instant case is a good example. Petitioner had *no ties* in Japan, he could not even read the language, his father and mother were here, he had only an American education. If any inference is to be drawn at all, it should be just contrary to that which respondent draws.[12]

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[12]It is noted that in the *Hamamoto* case, the plaintiff went to Japan in 1940. Here he went in 1939. These cases stand alone, however. Other courts have not drawn such an adverse inference. The following cases all held for the plaintiffs and are instances of late goers to Japan: *Ishikawa v. Acheson*, 85 Fed. Supp. 1949 (D. C. Haw.), plaintiff went in 1937; *Matoyama v. Acheson* #881, D. C. Haw.) plaintiff went in 1940; *Furukawa v. Acheson*, #8913, S. D. Cal., plaintiff went in 1941; *Murata v. Acheson*, 111Fed. Supp. 306 (D. C. Haw.), plaintiff went in 1940; *Yoshida v. Dulles*, 116 Fed. Supp. 618 (D. C. Haw.), plaintiff went in 1941; *Okada v. Dulles*, 134 Fed. Supp. 183 (D. C. N. D. Cal.) plaintiff went in 1941 even after having registered here under the 1940 draft act.

Respondent states (Resp. Br. 32): "Petitioner voluntarily subjected himself to the foreign draft law, and there was no showing that he could *not* have avoided service if he had tried." This line of reasoning not only disregards the fact that it is the government which must prove *its* case by the very strong standard required, and not only does it disregard cases such as *Monaco v. Dulles*, 210 F. 2d 760, 761 (C. A., 1954) where the plaintiff actually "ignored the warnings of the State Department, made in response to Italian laws of dual nationality, to secure permission to enter Italy without liability for military service," but reduced to its true meaning, respondents argument is simply that petitioner went to Japan. On such a slender reed expatriation does not rest.

Respondent glosses over the record when he states (Resp. Br. 31, 3, 4) that when petitioner went to Japan he knew "his name was in the family register there and that he was a national of that foreign country." The evidence is [R. 34] that he knew these facts at the time he entered the army in 1941. It does not follow, even if material,[13] that he knew such facts when he left the United States in 1939. This makes even more erroneous the trial court's findings [R. 11] that when petitioner went to Japan in 1939 he knew "he was likely to be called for military service in the Japanese Armed Forces." There is not one single shred of evidence to support such a finding even were this an ordinary case; nor does respondent suggest any.

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[13]Which it is not. (*Cf. Monaco v. Dulles*, 210 F. 2d 760, 761 (C. A. 2 1954).)

C.

The Government Has the Ultimate Burden of Proving That Petitioner's Conduct Was Voluntary. (Reply to Respondent's Point I, C; Resp. Br. 33-45.)

The Government's reliance (Resp. Br. 34-36) on the legislative history is as misplaced here as it was in *Dos Reis ex rel. Camara v. Nicolls*, 161 F. 2d 860 (C. C. A. 1, 1947) where it argued that the subsection here in question applied to involuntary as well as voluntary conduct (see 161 F. 2d at 864, n. 4, and 865). In *Dos Reis* the Government had argued that the fact that the Committee had not put in the word "voluntary" when requested so to do by Mr. Henry F. Butler, showed that Congress intended the subsection to apply to involuntary conduct. The Government retreats from that argument here, of course, but now argues (Resp. Br. 36) that the failure to insert that word means that it was establishing a new definition of expatriation, namely that expatriation means service in a foreign army,[14] *provided* that one could be excused from expatriation if he showed his act was not voluntary. As did the court in *Dos Reis* (161 F. 2d at 864, fn. 4) we believe the failure to insert the word "voluntary" had no such sweeping purpose; "that the failure of the committee to accept this amendment is of little significance in view of the legislative history . . . indicating that such amendment was unnecessary and superfluous." (*Ibid.*)

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[14]At the time of the Fluornoy-Butler involuntary-voluntary proposals, the Senate Amendment (86 Cong. Rec. 12817; Sen. Rep. #2150, 76th Cong. 3d Sess. to accompany H. R. 9980, p. 3) requiring the possession or acquisition of the foreign nationality was not yet in the bill. (Pages 358, 387 of Hearings before the Comm. on Imm. & Naturalization, H. of R. 76th Cong. 1st Session H. R. 6127 superseded by H. R. 9980).

Respondent characterizes (Resp. Br. 30) petitioner's argument as a contention "that voluntariness is a condition precedent to expatriation." The particular choice of words to define what expatriation is, is unimportant. We prefer, however, this Court's definition, which we believe to be the law, that "expatriation *is* the *voluntary* renunciation or abandonment of nationality." (*Perkins v. Elg*, 307 U. S. 325, 334.) (Italics added.) We agree with the Third Circuit that "the *very essence* of expatriation is that it be voluntary." (*Dorcau v. Marshall*, 170 F. 2d 721, 723.) (Italics added.) If this be so—if the very heart of expatriation is that it be voluntary—we can see no escape from the rule being that the ultimate burden of proving the essence of expatriation is upon the Government which must prove expatriation in the first place.

Reliance by respondent (Resp. Br. 30) upon the out of context statement of Congressman Rees is surprising. It is perfectly clear that the Congressman was not speaking of an expatriation case at all; nor was he speaking of Section 401(c). The statement of the Congressman was during the colloquy on that portion of the Conference Report (86 Cong. Rec. 13244) which agreed to the addition of Section 503 and had to do with the obtaining by a person out of the country of a Certificate of Identity enabling him to come here and testify in his court trial.[15]

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[15]Specifically the answer was in response to a long statement and question by Congressman Jenkins some of which we set out here. (86 Cong. Rec. 13247, 13248)

> "What you are saying in this amendment is that a man who has never been in the United States at all but who claims he is a national either because his parents were, or on some other ground *but is not, in fact*, a national, can make applica-

All the Congressman was saying is that one who claims to be a national, must initially establish his claim to citizenship.[18] Petitioner has no quarrel with this. The nature of what that initial proof will be will depend, of course, on the issue involved: whether the person was born a citizen, the government claiming he was not (*e.g., Dulles v. Quan Yoke Fong*, 237 F. 2d 496 [C. A. 9, 1956], *Dulles v. Tom Suey Jin*, 237 F. 2d 500 [C. A. 9, 1956], *Chin Chuk Ming v. Dulles*, 225 F. 2d 849 [C. A. 9, 1955]) or whether the Government admits the person was born a citizen but claims he has expatriated himself, as here. Under the expatriation cases, there is no problem of proving citizenship at birth, the Government admitting

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tion in our courts to have tested the question of whether he is a national . . .

"This law goes too far in this respect . . .

"Of course you have one very fine provision in here. If the consul over there is on his job he can make that fellow prove all these things before he gives him a certificate (of identity), but if he is inclined to be loose he may say, 'We will let him go through.' He claims he is a national and we will give him a certificate. . . . We should make our immigration laws fair . . . but we cannot be too strict toward the imposters . . .

In answer to this, Congressman Rees said (80 Cong. Rec. 13248):

"Under the present law, the individual the gentleman from Ohio is talking about (one not born here who claims derivative citizenship from his parents) does not have to go through any process at all. . . . In this act (in order to get a certificate of identity) we put the burden of proof upon *that individual* to show that he is a citizen or national of the United States . . ." (Italics and parenthesis added).

[18]Section 503 does not require that this initial proof be conclusive. It need only be in good faith and have substantial basis

it in the issuance of the Certificate of the Loss of the Nationality of the United States." [R. 12, 13, 20-21.][17]

Similarly is respondent's reliance (Resp. Br. 37-39) upon Section 402 of the 1940 Act (8 U. S. C. [1946 Ed.] 802) misplaced. In the first place, respondent is in error when he says (Resp. Br. 37, 38) that the "presumption (of 402) can be overcome, of course, by proof that the claimant did not enter the foreign army or take a government job, but until proof is made the presumption of expatriation 'shall exist.'" This statement contradicts respondent's previous statement (Resp. Br. 37), which *is* the law, that "(s)ection 402 does not enlarge upon the substantive requirements of Section 401(c)."[18] Unless and until there is proof that the citizen served in a foreign army or had a government position for which only nationals of that country were eligible,[19] there is simply

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[17]Of course, even in the actual trial of a 503 action, the burden of proof problem will vary depending upon the nature of the issue. If it is a case where the plaintiff claims he was born a national of the United States and defendant claims he was not, the burden is upon plaintiff to establish that fact. Examples are the Chinese cases (*e. g.*, *Lee Shee v. Dulles*, 219 F. 2d 413; *Lee Shee v. Broxnell*, 219 F. 2d 301). But where, as here, it is an *expatriation* case, the Government admitting (R. 21) that plaintiff was born a citizen of the United States but contending that he *expatriated* himself, of necessity, both in logic and, as the cases have shown, the burden of proving that expatriation lies with the Government; and it is a burden of the heavy nature described that must be borne as to *all* elements of expatriation throughout the trial.

[18]In *Dos Reis, ex rel. Camara v. Nicolls*, 161 F. 2d 840, 848, the language of the First Circuit was that the section "does not enlarge the content of §401(c)."

[19]*Cf.* these reported cases decided under section 401(d): *Oye v. Acheson*, 110 Fed. Supp. 635, 636 (D. C. N. D. Cal. 1953); *Furuno v. Acheson*, 100 Fed. Supp. 775 (D. C. S. D. Cal. 1952); *Nato v. Acheson*, 100 Fed. Supp. 770 (D. C. S. D. Cal. 1952); *Furusho v. Acheson*, 94 Fed. Supp. 1021, 1023 (D. C. Haw. 1951).

not the faintest suggestion of expatriation and no presumption can arise from the non-existent facts and certainly cannot "exist."

Whatever may be the ultimate burdens of the parties in a case like this, it is clear that 8 U. S. C. 802 cannot aid respondent in this case because, under the circumstances here, its force is quickly and early spent. For, as this court said in regard to the section from which 8 U. S. C. 802 was taken (Sec. 2 of Chap. 2534 of the Act of March 2, 1907, 34 Stat. 1228, 8 U. S. C. 16 and 17):

> "(I)t is a presumption easy to preclude and easy to overcome."
>
> *United States v. Gay*, 264 U. S. 353, 358.

Accord:

> *Camardo v. Tillinghast*, 29 F. 2d 527, 530-531 (C. A. 1, 1928);
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> *United States v. Eliasen*, 11 F. 2d 785, 786 (D. C. W. D. Wash., 1926);
>
> *In re Alfonso*, 114 Fed. Supp. 280 (D. C. D. N. J., 1953).

Moreover, the last three cited cases, as well as *Garcia Laranjo v. Brownell*, 126 Fed. Supp. 370, 372-373 (D. C. N. D. Cal., 1954), make the point, approving the opinion of Attorney General Wickersham (28 Op. Atty. Genl. at 508), that the section has no other purpose than to fix a time limit for a citizen residing overseas beyond which the Government is relieved of the obligation to protect such citizens residing abroad, and that the section does not establish a rule of expatriation.

Kawakita v. United States, 343 U. S. 717, makes it very clear that it was following this court's previously established rule in the *Gay* case that the presumption of 8 U. S. C. 802 is "easy to preclude and easy to overcome," when it said (343 U. S. at 723-725) that merely obeying the law of the country in which one resides by a dual national, is not expatriating.

This demonstrates, we submit, that the most that can be said of Section 402 in aid of respondent's case, is that even if the section is a part of respondent's proof in this case, it was quickly and completely overcome by the evidence that petitioner's military service was due to conscription under law, to say nothing of the fact that the conscription was in militaristic, tyrannical Japan.

McGrath v. Abo, 186 F. 2d 766, cited by respondent (Resp. Br. 39), is inapposite. That case had to do with 8 U. S. C. (1946 Ed.) 801(i), an actual *formal renouncing* of United States citizenship. When one *formally renounces* his citizenship, the element of voluntary throwing off one's nationality is inextricably bound up in the act of renunciation. This is a far different thing from the act involved in the case at bar where the Government is seeking to *impose* loss of citizenship under a theory of *implied* abandonment or renunciation. Moreover, the *Abo* case was an action to *rescind* the renunciations and to *set them aside*. Thus the posture of that case was quite different from the case at bar. In addition to which that decision was before this Court's decision in *Gonzales v. Landon, supra*.

Furthermore, the *Abo* case actually supports petitioner, not respondent. For that case held that because of the conditions at Tule Lake at the time of the renunciations "a rebuttable presumption arises . . . . that their acts of renunciation were involuntary." (180 F. 2d at 773) and without evidence rebutting this presumption, plaintiffs were entitled to judgment (*ibid.*, at 774). The conditions at Tule Lake were comparable with those in Japan (*cf. Fukumoto v. Dulles*, 216 F. 2d 553, 554 [C. A. 9, 1954]).

We have pointed out above (pp. 6, 7) the inappositeness of respondent's analogy to the *defense* of insanity cases as to burden of proof. The same is true of the land-grant and patent analogy advanced by respondent (Resp. Br. 39). Respondent's difficulty stems from his failure to understand what expatriation is. Involuntary conduct is not merely a *defense* to expatriation; voluntary conduct is the very *essence* of expatriation (*Dorcan v. Marshall*, 170 F. 2d 721, 723), without which there is nothing as to which there can or should be a defense to. (*Perkins v. Elg*, 307 U. S. 325, 334.) In other words, voluntary conduct is one of the indispensable elements of expatriation, just as are, in this case, service in the foreign army and nationality of the foreign state, and the Government has the burden of proving all the elements of same.

This is a different thing, of course, from the burden of presenting evidence "to repel what has been proved." (*Morrison v. California*, 291 U. S. 82, 88, 89) (relied upon by respondent [Resp. Br. 41-44]). In this second

Morrison case this court, in explaining the first *Morrison* case (288 U. S. 591) was talking about proof of a fact "in justification or excuse of an act otherwise illegal" (291 U. S. at 89.) But such is not the case here. Unless and until the Government proves, and by the standard required, that the conduct was voluntary, there *is* no otherwise illegal or expatriating act. Moreover, in the first *Morrison* case, the *fact* as to which this court said the burden might properly be put upon defendant was "as to the place of birth" (291 U. S. at 89) "to show that by reason of his birth he was a citizen already." (291 U. S. at 88.) This, therefore, is no different from the requirement petitioner had here to show and did show, that he was born a citizen, or that plaintiffs in Section 503 cases have who, though born abroad, claim they have derivative citizenship (see discussion, *supra*, pp. 15-17). But it is not the same thing as requiring petitioner to show that he *lost* that citizenship; that burden is on the Government as to all elements.

Similarly is *United States v. Fleishman*, 339 U. S. 349 (Resp. Br. 41) not in point. This court was there talking about requiring the defendant "to present evidence to sustain" a defense. As stated, such is not our case here.

Respondent's attempted application of the rule as to burden of proof is misapplied in the case at bar, and does, we submit, run counter (see Resp. Br. 44) to this court's decision in *Gonzales v. Landon*, 350 U. S. 920. We have previously discussed (Op. Br. 14-16) the point that in *Gonzales* the petitioner had claimed that the Government had not proved the voluntary character of his act, and that this court so held in its decision.

D.

The Voluntariness of Petitioner's Conduct Has Not Been Established. (Reply to Respondent's Point I, D; pp. 45-50.)

Respondent argues (Resp. Br. 45) that if petitioner had the burden of proof, petitioner failed to carry it because the courts below held against him. This argument has been answered in petitioner's opening brief (pp. 16-35). However, because it is so apropos, we add here these words from a decision of the Board of Immigration Appeals (*Matter of G—R—*, 3 I & N Dec. 141, 154):

> "(W)here a person's conduct permits of two or more reasonable inferences, one unfavorable and the other or others favorable, we ought not to expatriate that person through a process of reasoning that gives no weight to the favorable inferences and that reaches the result by pyramiding one unfavorable inference upon another."

In his argument that if the Government has the burden of proof, the Government has sustained it (Resp. Br. 45-50), respondent, despite this court's decisions in *Baumgartner*, *Schneiderman*, *Perkins* and *Gonzales*, turns both the evidence and logic on end.

It must be remembered that *the Government introduced no evidence in the case.* [R. 49-50.] Therefore the "proof" upon which it relies to sustain *its* burden is the testimony of petitioner. Accordingly, the curious logic aside that the trial court was not required to believe that petitioner was himself the victim of terror conditions in Japan (Resp. Br. 46),[20] respondent's entire proof rests

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[20]Petitioner's Opening Brief discusses (p. 33) the fact that this was not really the basis of the trial court's ruling.

solely and completely upon *petitioner's testimony which the trial court did believe* as to what petitioner did not do. Refutation of this line of argument is also set forth in petitioner's opening brief (pp. 24-28, 31-32, 33-34).

We read this court's *Baumgartner*, *Schneiderman* and *Gonzales* decisions, and its admonition in *Perkins v. Elg*, 307 U. S. 325, 337 that "(r)ights of citizenship are not to be destroyed by an ambiguity," and its refusal in *Kawakita v. United States*, 343 U. S. 118, 122, to construe another subsection of 401 "so as to provide treacherous ground for the loss of rights of citizenship" as meaning not only that the Government is held to the strictest standard of proof in an expatriation case, but also that the factual record is to be read as far as is reasonable in favor of the citizen. We have pointed out above p. 13) respondent's erroneous reading (Resp. Br. 46-47) of the record as to when petitioner can be said to have known he was a national of Japan.[21] This is not construing the facts as far as is reasonable in favor of the citizen; it is construing the facts contrary to what the evidence is. Respondent belittles (Resp.

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[21]Respondent exhibits facility and dexterity for picking and chosing from petitioner's testimony, *none of which was contradicted*, as to which part should be believed and which part should not. Thus respondent does believe (Resp. Br. 47) that petitioner was beaten in the army for answering, in response to a question, that America would win the war. But he chooses not to believe (Resp. Br. 48) that petitioner feared harm from the Kempei Tei if he attempted to avoid the draft. (*Cf. Acheson v. Maenza*, 202 F. 2d 453, 459 where the court recognized that in Italy, even as early as 1935, "opposition to military service (would have been) not only futile and unavailing but exceedingly dangerous to the safety and perhaps the life of the person voicing such opposition." Respondent calls this (Resp. Br. 48) "timorousness." Thus respondent adopts the rejected "Spartan standard by which to determine whether (petitioner) acted voluntarily." (*Mendelsohn v. Dulles*, 207 F. 2d 37, 39 [C. A. D. C. 1953]).

Br. 48) petitioner's testimony [R. 28, 30][22] that during the interval between petitioner's physical examination (June, 1940 [R. 18]) and his induction into the army (March, 1941 [R. 18]) he did not know that the United States was drafting men. Aside from the fact that respondent's doubt does not supply evidence to the contrary,[23] respondent overlooks the fact that draft registration in the United States was not until October 16, 1940 (First Report of the Director of Selective Service, "Selective Service in Peacetime," (Govt. Printing Office, 1942, p. 73) and no one was inducted until November, 1940 (*Ibid.*, p. 121).

And respondent reads other portions of the record with only half an eye. Thus respondent doubts (Resp. Br. 48) petitioner's testimony [R. 29] that he did not read newspapers between September 16, 1940[24] and March, 1941. Aside, again, from the fact that respondent's doubt is not evidence that the petitioner did so read newspapers, and aside from the fact that respondent introduced no evidence to show what the newspapers contained, respondent disregards the further testimony that petitioner could not read Japanese characters [R. 29] and that the Nippon

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[22]Part of the testimony, by the way, on which respondent relies for its proof of voluntary conduct, and which he himself elicited.

[23]*Controller of California v. Lockwood*, 193 F. 2d 169, 172 (C. A. 9, 1951):

> "... Suspicion, no matter how aroused is not evidence.
>
> "... Courts may not find facts from speculation, no matter how difficult or impossible it may be to produce evidence establishing the fact in dispute."

[24]Apparently respondent had reference to the effective date of the Selective Training and Service Act of 1940 (54 Stat. 897).

Times[25] was not delivered out in the country where he lived [R. 29].

Respondent speaks [R. 48] of *forsaking* American citizenship in a difficult situation. Such a contention, we submit does not apply in this case. Moreover, it is stretching the facts beyond reason to say (Resp. Br. 48) that "petitioner's course of conduct" is *proof* of voluntariness. Furthermore, respondent's suggestion blithely ignores the fact that even in democratic United States an enemy alien had no right to relief from military duty under the 1940 Selective Service Act (*In re Gourary's Petition*, 148 Fed. Supp. 140, 142 (D. C. S. D. N. Y., 1957) citing section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885), and that we did, indeed, insist upon drafting such persons or punishing them by the criminal law if they did not obey (*Takeguma v. United States*, 156 F. 2d 437 [C. A. 9, 1946]).

There is no reason in logic, law or otherwise, for relieving, as respondent suggests (Resp. Br. 48-49), the Government of the requirement of proving the element of voluntary conduct to effect expatriation by the same high standard of proof as any other element. Indeed in the very cases which enunciated the rule as to the Government's burden (*Baumgartner* and *Schneiderman*), the question involved was subjective intent. In the criminal law intent is likewise "intimately linked with an individual's private will and particular mentality." (Resp. Br. 48-49). Nevertheless, the Government must prove this element of the crime, as well, by proof beyond a reason-

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[25] An English language newspaper published in Tokyo. (See depositions of Togosaki, pp. 1-2, and of Murayama, p. 1, lodged with the clerk of this court).

able doubt (*Onieu v. United States*, 349 U. S. 155, 165). It is a moot question as to whether the standards, "clear, unequivocal and convincing" and that expatriation cannot be effected "upon a bare preponderance of evidence which leaves the issue in doubt" (*Schneiderman v. United States*, 320 U. S. 118, 125) are the same as the "beyond a reasonable doubt" standard. Certainly the former require no less than the latter. If anything, the former is a greater standard than the latter for the proof must be "indeed overwhelming" (*Meyer v. United States*, 141 F. 2d 825, 827 [C. C. A. 5, 1944]).

Measured by these standards, respondent's contention (Resp. Br. 49) that the Government *proved* voluntary conduct, is not well taken.[26]

Respondent contends (Resp. Br. 49) that the materials lodged with the clerk of this court (see also Appendix to Petitioner's Opening Brief) in aid of the court's taking judicial notice of conditions in Japan should be disregarded. He does not contend, however, that this court cannot take judicial notice of such conditions, nor does he dispute, as of course, he cannot, the authorities cited by petitioner (Op. Br. p. 6, fn. 6; p. 22, fn. 20) to the effect that this court can, in aid of its judicial knowledge, take notice of the contents of the material. Even without such documentary aid, this court is not required "to shut

[26] The reference (Resp. Br. 49) to the court below's statement that the proof was clear and convincing had to do with the proof that petitioner had entered and served in the armed forces of Japan. (R. 75) not with whether the proof of voluntary conduct measured up to the standard. The court had already held that this element (involuntariness) was for petitioner to prove (R. 73).

(its) eyes to what all others . . . can see and understand." (*United States v. Butler*, 397 U. S. 1; 61.)[27]

Respondent's citation (Resp. Br. 50) of *Saccodato v. Dulles*, 226 F. 2d 243 (C. A. D. C., 1955) does not aid him. The case supports petitioner. For in that case the court reversed, as "clearly erroneous" (p. 247) the trial court's finding of voluntary military service, pointing out (p. 244) that in other cases "(a)rmy service in Italy under conditions there existing has been held to have been under legal compulsion."

II.

Section 401(c) of the Nationality Act of 1940 Is Unconstitutional (Reply to Respondent's Point II; Resp. Br. 50-51).

We comment here only on the Government's reference in its brief (pp. 38-39) in *Perez v. Brownell*, No. 572, this term, to section 401(c).

The Government speaks (Resp. Br. Perez, p. 38) of the "obvious possibility of conflict between two nations over the military service of the dual-national." But in considering the constitutional power of Congress to de-citizenize a citizen who is such by virtue of the Constitution and not Congress, that possibility is a *non-sequitur*. The possibility has never deterred us from requiring

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[27] *Cf. Acheson v. Maenza*, 202 F. 2d 453, 459 (C. A. D. C. 1953).

> "That testimony must be considered in connection with the well-known ruthlessness of the Fascist regime which, even as early as 1935, would hardly have tolerated resistance to its draft laws by an admitted national of Italy."

The trial court in the instant case was aware of these conditions (*Cf. Kondo v. Acheson*, 98 Fed. Supp. 884-887, Resp. Br. here p. 46, f. n. 19) but disregarded them.

military service by aliens.[28] And our right to so do has been upheld.[29] As pointed out at 25 So. Calif. L. Rev. 196, 198-199: "according to American legal theory, . . . the duty to serve in the armed forces (is not an) exclusive attribute of citizenship." It is unreasonable, therefore, the question aside as to the lack of delegated power in the Constitution, express or implied, to decitizenize, for Congress to be able to say that an alien may serve in the United States Armed Forces and still remain an alien (or dual citizen, as the case may be), but if he does the same thing in another country, he loses his citizenship here. If Congressional power to so ordain rests upon a theory of implied consent, the incongruity becomes even greater.

Moreover, the theory that Congressional power to decitizenize rests upon the problem of dual nationality, leads to an absurd result. It means that as to those countries whose laws provide that descendants of citizens of those countries are nevertheless citizens thereof,[30] Congress has the power to strip away United States citizenship if they serve in the foreign army. But as to those countries which have no such laws, Congress cannot so do. In other words Congress' *constitutional power* in this field depends upon the laws of a foreign country. We are aware of no such principle of constitutional law.

[28] Section 3(a), Selective Training and Service Act of 1940, 54 Stat. 885; Section 4(a), Selective Service Act of 1948, 62 Stat. 605, 50 U. S. C. Appx. 454(a). These sections also permit aliens to volunteer.

[29] *Takeguma v. United States*, 156 F. 2d 437 [C. C. A. 9 1946].

[30] Even if they or their ancestors renounced their citizenship as to such country. (*Cf.* historical statement in Petitioner's Opening Brief in *Perez*, p. 10).

An American citizen who has only American citizenship and serves in a foreign army, and it could be against his own country,[31] traduces, to use the Government's words (Resp. Br. p. 39, No. 572) the most essential obligation of the citizen, just as much as does the citizen with dual nationality.[32]

A.

Section 401(c) Should Not Be Construed to Apply to the Facts of This Case.

Respondent misunderstands (Resp. Br. 50-51) petitioner's argument (Op. Br. 30-40). The point is not that the section should not be applied to dual nationals *per se*, but that, in order to avoid unconstitutionality, when that fact (dual nationality) is coupled with compulsory military service under law plus physical presence in the country commanding the military service, absent any other conduct indicating a desire to expatriate, the Act has no application. This must be the proper interpretation if this Court's statement in *Kawakita v. United States*, 343 U. S. 717, 723, 725 (set forth at pp. 36-37 of App. Op. Br.) means anything.

This does not mean, as respondent suggests (Resp. Br. 51) that the section would have no application or function whatever. On the contrary, such an interpretation would reach the very thing at which Congress was aiming. See discussion, as to the legislative intent set

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[31] Cf. fn. 28, *supra*, p. 28.

[32] The present act (8 349 (a) (3), Immigration and Nationality Act, 1952, 66 Stat. 267, 8 U. S. C. 1481 (a) (3)) does not require dual nationality as a condition of expatriation.

out in *Dos Reis ex rel. Camara v. Nicolls*, 161 F. 2d 860, 863-867. It would reach the person who, by his conduct, shows that his "real attachment is to the foreign country and not to the United States." (*Ibid.*, p. 864.) It would not reach the person who merely obeys the laws of the country in which he is residing (*Cf. Takeguma v. United States*, 156 F. 2d 437 [C. C. A. 9, 1946]), as to which person the Government successfully argued to this Court (Br. in *Kawakita*, referred to at p. 11, *supra*), he is "unequivocally excused."

Conclusion.

The judgment of the court below should be reversed and petitioner declared to be a national and citizen of the United States.

Respectfully submitted,

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